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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

**MICHAEL DAVID GUTIERREZ,**

Petitioner,

**v.**

**JAMES A. YATES, Warden,**

Respondent.

C 07-3668 RMW (PR)

**ANSWER TO ORDER TO  
SHOW CAUSE**

Respondent provides this answer to the Order to Show Cause why the petition for writ of habeas corpus should not be granted.

**I.  
CUSTODY**

Petitioner is lawfully in the custody of the California Department of Corrections and Rehabilitation as the result of a judgment of conviction in Santa Clara County in Case No. CC456850.

On June 16, 2004, the District Attorney filed an information in Santa Clara County

Superior Court accusing petitioner, Michael David Gutierrez, as follows: count one, carjacking where the victim is the driver in violation of California Penal Code § 215<sup>1/</sup> with enhancements for personal use of a deadly weapon within the meaning of § 12022(b)(1), and personally inflicting great bodily injury within the meaning of §§ 12022.7 and 1203(e)(3); count two, assault with a deadly weapon in violation of § 245(a)(1), with enhancements for personal use of a deadly weapon within the meaning of §§ 667 and 1192.7 and personally inflicting great bodily injury within the meaning of §§ 12022.7(a) and 1203(e)(3). It was further alleged that petitioner had been previously convicted of two felonies for which he had served separate prison terms within the meaning of § 667.5(b), including one of which was a violent or serious felony within the meaning of §§ 667.5(c) and 1192.7(c), and a serious felony within the meaning of §§ 667.5(a) and 1192.7. 1 CT 9-13.

On November 23, 2004, a jury returned verdicts of guilty and found the allegations of weapon use and infliction of great bodily injury to be true. 1 CT 147-51. Both parties waived their rights to a jury trial of the prior-conviction allegations. 1 CT 151.

On December 6, 2004, the District Attorney's motion to dismiss the prior-conviction allegations under § 667.5 was granted, and the court found the remaining prior-conviction allegations to be true. 1 CT 154.

On February 17, 2005, the court sentenced petitioner to state prison for a term of twenty-six years, consisting of eighteen years for double the upper term for count one, plus three years for the great-bodily-injury enhancement, plus five years for the prior-conviction enhancement. A sentence of six years for double the midterm for count two was imposed concurrently. 1 CT 233-35.

On November 20, 2006, the California Court of Appeal, Sixth Appellate District, affirmed the judgment. Exh. F.

On February 7, 2007, the California Supreme Court denied petitioner's petition for review. Exh. H.

On July 17, 2007, petitioner filed a petition for writ of habeas corpus in this Court.

On February 12, 2008, this Court issued an order to show cause.

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1. Unspecified statutory references are to the California Penal Code.

1 **II.**

2 **VERIFICATION**

3 Petitioner signed and verified the petition.

4 **III.**

5 **GENERAL AND SPECIFIC DENIALS**

6 Respondent denies that the state court's rulings were based on unreasonable  
 7 determinations of facts or were contrary to or involved an unreasonable application of clearly  
 8 established United States Supreme Court law. Respondent specifically denies petitioner's claims  
 9 as follows: one, petitioner's federal constitutional right to due process was violated when the trial  
 10 court improperly allowed the testimony that Mr. Lionetti had identified petitioner in person, in a  
 11 one-person show up at the hospital, which was erroneously admitted over objection in violation of  
 12 his right to confrontation; two, petitioner's federal constitutional right to due process was violated  
 13 when the trial court erred in excluding evidence which provided an alternative reason for petitioner  
 14 to avoid contact with the police on January 7, 2004; and three, the cumulative errors were  
 15 prejudicial.

16 **IV.**

17 **PROCEDURAL ISSUES**

18 Petitioner exhausted state remedies for his claims that are contained in the petition.  
 19 Petitioner filed his petition within the one-year statute of limitations period set by 28 U.S.C. §  
 20 2244(d).

21 **V.**

22 **LODGED DOCUMENTS**

23 Respondent is lodging concurrently with this answer the following exhibits:

- 24 EXHIBIT A Clerk's Transcript (2 vols.), *People v. Gutierrez*, Santa Clara County Case No.  
 CC456850.  
 25 EXHIBIT B Reporter's Transcript (4 vols.), *People v. Gutierrez*, Santa Clara County Case  
 26 No. CC456850.  
 27 EXHIBIT C Appellant's Opening Brief, *People v. Gutierrez*, California Court of Appeal  
 28 Case No. H028515.

1 EXHIBIT D Respondent's Brief, *People v. Gutierrez*, California Court of Appeal Case No. H028515.

2 EXHIBIT E Appellant's Reply Brief, *People v. Gutierrez*, California Court of Appeal Case  
3 No. H028515.

4 EXHIBIT F Opinion, *People v. Gutierrez*, California Court of Appeal Case No. H028515.

5 EXHIBIT G Petition For Review, *People v. Gutierrez*, California Supreme Court Case No. S149143.

6 EXHIBIT H Denial Of Review, *People v. Gutierrez*, California Supreme Court Case No. S149143.  
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8 **VI.**

9 **INCORPORATION BY REFERENCE**

10 Respondent hereby incorporates by reference the accompanying memorandum of points  
11 and authorities in support of this answer.

12 **VII.**

13 **CONCLUSION**

14 Respondent respectfully requests that the petition for writ of habeas corpus be denied with  
15 prejudice.

16 Dated: April 14, 2008

17 Respectfully submitted,

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